

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 31 August 2007

CASE NO.: 2007LDA00083

OWCP NO.: 02-148368

In the matter of:

P.S.,

Claimant,

v.

COMBAT SUPPORT ASSOCIATES, LTD.,
Employer,

and

INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA, c/o AMERICAN
INTERNATIONAL UNDERWRITERS,
Carrier.

Appearances: Kurt A. Gronau, Esq.
For Claimant

Jerry R. McKenney, Esq.
For Employer

Before: Kenneth A. Krantz
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the Act" or "LHWCA"), as amended, 33 U.S.C. § 901, *et seq.*, as extended by the Defense Base Act, 42 U.S.C. § 1651, *et seq.* J.S. ("Claimant") is seeking compensation and medical benefits from Combat Services Associates ("Employer" or "CSA") and Insurance Company of the State of Pennsylvania ("Carrier") for a work-related injury she suffered on May 5, 2006, and the alleged sequelae that arose from that injury.

A formal hearing was held in this case on May 30, 2007, in Newport News, Virginia, at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. At the hearing, Claimant offered Exhibits 1 through 16, which were admitted into evidence.¹ Employer offered Exhibits 1 through 42, Claimant objected to exhibits 36-38, on the grounds they violated the pre-trial discovery order. Employer's Exhibits 1-35 and 39-42 were admitted into evidence. The Claimant's objections were taken under advisement and on July 2, 2007, I issued an order overruling Claimant's objections and Employer's Exhibit's 36-38 were admitted into evidence. Claimant and Employer jointly submitted one exhibit. Additionally, Administrative Law Judge Exhibits 1 through 4 were entered into evidence without objection at the hearing.

The record was held open after the hearing until June 20, 2007. Employer entered Exhibits 43 through 48 post-hearing, without objection; all of which are hereby admitted into the evidence. Both parties subsequently filed post-hearing briefs. The findings and conclusions that follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

The parties have stipulated and I concur that:

1. The LHWCA, 33 U.S.C. § 901 *et seq.*, as amended, applies to this claim.
2. The nasal fracture injury occurred on May 5, 2006.
3. The injury occurred [in] Kuwait.
4. The injury arose out of and in the course of the [Claimant's] employment with Employer.
5. There was an Employer/Employee relationship at the time of the injury.
6. The Employer was timely notified of the injury.
7. The claim for benefits was timely filed.
8. The Notice of Controversion was timely filed.
9. The Informal Conference was conducted on October 6, 2006.

¹ The following abbreviations will be used as citations to the record:

CX – Claimant's Exhibit
EX – Employer's Exhibit
JX – Joint Claimant/Employer Exhibit
AX – Administrative Law Judge's Exhibit
TR – Transcript of May 30, 2007 hearing

10. Temporary total disability (TTD) compensation has been paid from May 6, 2006, to March 28, 2007, at the rate of \$576.58 per week.

11. The [Claimant] has not returned to [her] usual job.

12. The [Claimant] has engaged in alternative employment with Blueridge General from September 11, 2006, to September 25, 2006, at the hourly rate of \$11.

JX1 (as of the date of the hearing Claimant has continued to receive her \$576.58 per week TTD compensation payments).

ISSUES

The following unresolved issues were presented by the parties:

1. Causation of Claimant's alleged injuries, except as to the nasal fracture.
2. Claimant's average weekly wage (AWW) at the time of the injury.
3. Claimant's entitlement to continued TTD compensation.
4. Claimant's entitlement to any interest and penalties under the Act.
5. Claimant's entitlement to Section 7 medical benefits under the Act.

BACKGROUND

The Claimant, a thirty-nine year old woman, was employed as a Lead Recreational Specialist in Kuwait when she sustained an on-the-job injury after the wind knocked a tent post into her face, resulting in an acute nasal fracture. CX6 at 16; TR at 37-38. Claimant had reconstruction surgery for her nasal fracture in Kuwait, though subsequently developed other alleged symptoms. TR at 42. These additional symptoms included headaches and neck pain that radiates down into her left arm and middle, ring and little finger on her left hand. TR at 91. These additional symptoms did not resolve themselves and it was mutually decided that Claimant would take a termination for medical convenience and go back to the United States for treatment. EX20; EX38 at 72-73.

At this time, Claimant is seeking authorization for surgery on her neck, to be performed by her treating physician, Dr. Partington.² Additionally, she would like her medical expenses she has paid out of pocket reimbursed, and her referrals for treatment authorized. TR at 99. The Employer requests that an order be issued establishing Claimant's AWW in the method they have prescribed. Additionally, Employer asks that any decision of Claimant's entitlement to neck surgery under Section 7 of the Act be deferred or remanded to the district director until after she receives the conservative treatment that Dr. Budorick has recommended, and her

² Dr. Partington's name was misspelled in the transcript as "Pardington."

condition and any need for future surgery can be revisited. Employer's Post-hearing Brief at 19, 24.

SUMMARY OF THE EVIDENCE

Claimant's Testimony (Hearing and Oral Deposition)

Claimant testified that on the morning of the injury, May 5, 2006, she had been setting up and decorating the special events tent for the troops to celebrate Cinco de Mayo, and had been in the tent since 9 p.m. the day before. TR at 36-37. She testified that shortly before 3 a.m. a high wind storm kicked up and the tent cloth pushed into a metal support beam and knocked it loose, striking her across the face. TR at 38. Claimant described the impact as, "Uh, it was horrific. Um, I never felt such a pain in my life. Um, I was obviously in shock, and, um, I – I just wanted somebody to tell me what was wrong, what happened, um, what was wrong with my face that I was okay. TR at 38. Claimant testified she briefly lost consciousness. TR at 39.

She testified that she was initially treated at the base clinic and was then sent to the International Clinic in Kuwait City, where they had better x-ray machines and could provide more complete care. TR at 40. At approximately 9 a.m. on the same day as the accident, May 5, 2006, she was seen by Dr. H.F. at the International Clinic. TR at 41. She had to wait in the hospital for three to four days until the swelling went down and then she had reconstructive surgery on her nose. TR at 41-42. Claimant testified that she received excellent medical care in Kuwait for her nose, but she was unhappy that while in Kuwait Employer would not authorize more than the initial six visits for physiotherapy to help with her neck pain and spasms. TR at 42.

Claimant testified that while she was convalescing in Kuwait her supervisor repeatedly called her encouraging her to talk her doctor into releasing her back to work, whether she was ready or not. TR at 46-47. She testified that he (her supervisor) told her she could not live in a bubble, and tried to make her believe her injury was nothing, that it was minimal and she should return to work. TR at 47. Claimant testified that she did return to work in about three-and-a-half weeks, though she only lasted about four hours. TR at 48-49. She testified to continued trouble with her chain of command. TR at 49-52. Claimant testified that she went to meet with Mr. Lint, the person in charge of all the operations in Kuwait, and that he engaged in inappropriate behavior towards her, stating:

Before I left his office he – the bottom, uh, the last straw was that he rolled his chair around from his desk, and he was quizzing me on the Kuwaiti cultural and traditions, he shamed me, and gapped his legs open, and bared the sole of his foot towards me and he asked me if I knew what he meant. And he – his eyes were looking down to where he wanted me to look. Um, and I told him, 'yes, I understand the sole of the foot may – what the foot means, it's disrespectful.' And I stood up, I think the first time and I left.

TR at 53.

Claimant testified that Employer offered her a medical convenience termination that would allow her convenient medical care back in the states where the Employer's insurance company was located. TR at 55. Claimant testified that when she left Kuwait on the medical convenience termination she returned to California, to be with her Mother since she was so tired. TR at 57. She further testified that she spent at least a week-and-a-half at her Mothers and saw no doctors while she was there. TR at 58. She next flew to Richmond and spent four days with friends and then relocated to Virginia Beach where her children are located. *Id.*

Claimant testified to a bad early interaction with Tracy True, the claims adjuster for AIG, the Employer's insurance company. TR at 59. After first being told she would get the care she needed, she testified that Ms. True was later abrupt with her and told her she would only agree to pay her a certain percentage of her average weekly pay. *Id.* Claimant testified that Tracy True and Amy Tenise, the nurse case manager with Concentra Healthcare, were the ones that choose Dr. Nanavaty for her to see. TR at 62. Claimant described the symptoms that took her to Dr. Nanavaty as:

A. I was having extreme headaches, um, spasms in between my eyes, um, difficulty breathing on the left side of my [nose], and a lot of trouble sleeping, um, tossing and turning because of stiffness, headaches. I – I didn't feel good. I had a lot of sensitivity to light, um, because it was the middle of summer, um, and I just didn't feel good.

Q. What about your neck?

A. It – I was having extreme headaches from, radiating from the back to the front of my head. Um, some numbness in my left arm, mostly in my fingertips. Um, it was excruciating pain. It was very stiff. Um, it's just very difficult for me to maintain the type of activities that I'm used to at the pace I'm used to.

TR at 65. Claimant further testified that Dr. Nanavaty refused to continue seeing her because she missed two appointments. TR at 71. Claimant testified that she only missed two appointments with Dr. Nanavaty but that Amy Tenise claimed she had missed six appointments with him. EX38 at 153. Claimant stated her benefits were terminated by the Employer because of her missed appointments. TR. at 72. She testified that she had feelings of sadness and humiliation when her benefits were terminated and she had to apply for food stamps so she could feed herself and her children. *Id.*

Claimant testified that she went to see Dr. Balkam, a chiropractor, on her own and that Employer has not paid for his services. TR at 68. She testified that Dr. Balkam's treatment of electromagnetic therapy, warm therapy, and massage was done for pain management. *Id.* Claimant testified that Dr. Balkam had been manipulating her spine but that treatment stopped once the MRI identified a syrinx in her spine. *Id.*

Claimant testified that Employer ceased paying for the drugs she was prescribed at Walgreens, where she had had her prescriptions filled since returning from Kuwait. TR at 79. Claimant further testified that it took her around twenty-two hours to put together a sheet

documenting all the mileage she incurred seeking treatment and that Employer has never reimbursed her for that mileage. TR at 82-83.

Claimant testified that Dr. Partington, her choice of treating physician, referred her to Dr. Spear for physiatry treatment, and that the Employer did not authorize the recommended physical therapy. TR at 89-90. She testified that she was never provided with any pain management or physiatry. TR at 90. Claimant testified that she last saw Dr. Partington about two to three weeks before the hearing and that he had recommended surgery on her back. *Id.* She stated that the surgery Dr. Partington recommended involved inserting a plate in between her disc that had been blown out, and that this would relieve the pressure on her syrinx and prevent it from enlarging. *Id.* She testified to excruciating pain in her left elbow and numbness in her middle, ring and little fingers of her left hand. TR at 91.

Claimant testified that the numbness and pain in her left arm causes her to drop things out of her left hand continuously. TR at 92. She also testified that she has scarring on her left hand because of all the times she's been dizzy and fell into walls. *Id.* When describing how her left hand acquired scarring from dropping things she stated, "[b]ecause, as I'm pulling things, taking things in from my house or taking things out of my house, if I'm catching myself up against the wall. I usually try to catch myself before I fall, to catch my balance, and it scraped up against the wall." TR at 92-93.

Claimant testified that after her benefits were terminated she went to work for Blue Ridge General and set up the contractor's satellite office. TR at 96. She testified that she only worked there less than two weeks and was eventually fired after repeatedly turning down her bosses inappropriate advances. TR at 97-98. Claimant did not recall if she disclosed to the Employer that she was employed by Blue Ridge General. TR at 98. She also testified that she has filed EEOC complaints for discrimination based on her sex and disability against the Employer. *Id.*

On cross examination, Claimant testified that she jogged once or twice a week, and that she did a walk and jog combination more frequently. TR at 100. Claimant testified that after her December 2005 motor vehicle accident (MVA) she did not remember complaining of headaches so severe that the doctors diagnosed her with post-concussion syndrome. TR at 108. The questioning on this follows:

Mr. McKenney [employer's counsel]: I'm looking at Employer's Exhibit 37, page 45.

Q. You can look at that...Are you able to read the writing there?

A. Yes.

Q. Now these are the records that were made during the course of your treatment after that accident.

A. Mm-mm.

Q. And, if I'm reading this correctly, and please tell me if it's wrong, in the second paragraph about two-thirds of the way down the page it says, "Hit her head during MVC, motor vehicle collision."

A. Mm-mm.

Q. "No LOC;" that's no loss of consciousness.

A. Mm-mm.

Q. "Now complains of headache, memory problems and malaise, occasional nausea, occasional blurred vision. Probably post-concussion syndrome;" do you see that?

A. Mm-mm.

Q. Yes?

A. Yes, I do see it.

Q. And then if you look on the next page, page 46, right in the middle, the first diagnosis is post-concussion syndrome, isn't it?

A. Mm-mm.

Q. Yes?

A. Yes.

. . .

Q. All right. And then if you look about four steps down there's another notation of shoulder and neck pain; do you see that?

A. Where is this at?

Q. Page 47 of Exhibit 37.

A. "Blurred vision and dizziness?"

Q. Right there, "shoulder and neck?"

A. Okay.

Q. So you were complaining of shoulder pain weren't you?

A. I was complaining of my neck being sore, um, because I was rear-ended in the car accident. And obviously when you have a sinus infection, or, when I've had a sinus infection, my whole head hurts. So we were trying to determine if the symptoms were related to the car accident with the emergency room, or if it was actual sinus infection.

Q. Okay. So did you have headaches and did you have shoulder pain?

A. Of course I did. I was sick

TR at 108-111. Claimant further testified that she had a CT scan of her head two weeks after the motor vehicle accident. TR at 112. She also testified that she still maintained that the headaches from her accident in Kuwait were worse than the ones that led to her head CT scan following the MVA. *Id.*

Claimant testified that following her December 2005 MVA she saw Dr. Scott, a chiropractor, for treatment and that he referred her for a neurological consult for dizziness and vertigo. TR at 112-113. She further testified that the dizziness and vertigo went away without treatment in early 2006, after her sinusitis and muscle soreness cleared up. TR at 113.

At a May 7, 2006 deposition Claimant discussed her health prior to her work with Employer. When asked how she would characterize her state of health prior to working for Employer, Claimant stated, "I was very athletic, no problems." She was next asked, "No problems medical or orthopedic or otherwise?" and answered, "No." EX38 at 63. Of note is the following exchange:

Q. Have you ever had any treatment for headaches or neck problems before this CSA incident?

A. I had a brief time, right after the car accident, but it was soft tissue and was not – the x-ray showed no vertebrae disk protrusions or anything like what's going on now.

. . .

Q. Who was treating your neck?

A. A Dr. Scott

Q. Is this the chiropractor with Dr. Bawcom?

A. No. They know each other, but they are not in the same office.

Q. So you treated with Dr. Scott for the neck problem—

A. Uh-huh.

Q. – after the accident?

A. Yes.

Q. Where did your neck hurt and where did the symptoms go?

A. It was mostly in the top part of my head.

Q. In your neck?

A. In my neck, just at the nape of my – the bottom of my neck; right here.

Q. Bottom of your head?

A. Bottom of my head.

Q. Where your head and neck join?

A. Right. It was just a little bit sore. So they just wanted to take an x-ray to make sure there was nothing wrong, and there was nothing wrong.

Q. Did you have any arm symptoms?

A. No.

Q. How quickly did it resolve?

A. Very quickly.

Q. And you had no complication or resolution from that?

A. No.

EX38 at 66-68.

Claimant testifies that she has an EEOC complaint against the Employer and a sexual harassment complaint as well. EX38 at 87. She stated the harassers in the sexual harassment complaint were two male supervisors. *Id.* She testified that they both harassed her by showing her their genitalia and also harassed her because of her disability. *Id.* She testified that this harassment occurred after her injury. EX38 at 88.

Claimant testified that when driving she needs to make frequent stops to stretch. For example, in making the two-hour drive from Norfolk to Richmond she has to stop two to three times to stretch. She testified to needing to stop every forty-five minutes to stretch when she's making longer drives. EX38 at 137. She further testified that it was stiffness in her neck and arm that cause her to have to stop, walk around and stretch. EX38 at 138.

Jonathan P. Partington, M.D.

Claimant was referred to Dr. Partington, a board certified neurosurgeon, by Dr. Nanavaty. CX14 at 4-6. Dr. Partington testified that based on Claimant's MRI report dated August 7, 2006, she had a herniated disk between the fifth and sixth vertebrae to the left with some spinal cord compression, and also had a post-traumatic small syrinx. CX14 at 6-7. Dr. Partington opined that the Claimant's syrinx did not pre-exist the disk herniation. CX14 at 9. Dr. Partington testified that he was not prescribing Claimant antidepressant medicine. CX14 at 19. Dr. Partington further opined that, within medical certainty, Claimant's injuries and neck complaints are consistent with her injury in Kuwait and within medical certainty are connected. CX14 at 22.

On cross examination the following exchange is noteworthy:

Q. All right. Now, what information do you have, doctor, about [Claimant's] past medical history, specifically with regard to injuries to her neck and arms?

A. The history that she gave me is that she had no prior history, you know, of spinal surgery, and that she had no similar symptoms prior to her injury.

Q. So you're proceeding with regard to, not only your diagnostic conclusions and your treatment decisions, but also your opinions on causation, with the belief that [Claimant] sustained no injury to her neck prior to this incident in Kuwait. Is that true?

A. Yes. I mean, I have no historical data that would indicate as such.

Q. All right. And so when you opine that her current presentation is a result or is connected to the incident in Kuwait, you are, in part, relying on your belief that she had no prior injury. Is that true?

A. That's correct.

Q. If she did have prior injury, then that would be an important component to your decision-making relative to causation, would it not?

A. Certainly. I mean, obviously, if she had had neck and left arm complaints, you know, before the injury, then to directly relate the accident to her current complaints, obviously, comes into question.

CX14 at 28-29.

Dr. Partington further testified on cross examination that there was no accurate way to date when Claimant's disk herniation occurred. CX14 at 29. He also testified that the

origination of Claimant's syring was could not be dated. *Id.* The following exchange in regards to Claimant's syring is of note:

Q. And a similar dependency on [Claimant's] truth, veracity and creditability in terms of giving you her history, correct.

A. Yes.

Q. Is it likely, in your opinion, given [Claimant's] age and her smoking history, that there was some degree of degeneration at C5/6 before she ever went to Kuwait?

A. It's possible. But, I mean, again, if the history is correct, she was asymptomatic prior to that.

CX14 at 29-30.

Dr. Partington further opined that true traumatic disk ruptures are incredibly rare. CX14 at 30. He also opined that given her symptoms he would expect that for her to lightly jog would create significant pain if done for any length of time. CX14 at 31. The following exchange on cross examination is also noteworthy:

Q. Your opinion that the – and I asked this question a little differently previously. That's why I quoted this. Your opinion that both the C5/6, as well as the syring, were caused by this incident in Kuwait, is entirely dependent upon the credibility of Ms. Sorrell's history; is that correct?

A. Correct

CX14 at 36. When discussing causation of Claimant's injury, Dr. Partington states, "Her causation, obviously, is a different story in the sense that if she had documented disk herniation, documented neck and arm complaints prior to the injury, then, obviously, it would be hard to simply attribute her symptoms now to the injury in Kuwait." CX14 at 38.

Additionally, the following exchange with Dr. Partington is also noteworthy:

Q. Just a couple of other questions. What factors would you consider, if they were brought to your attention, that would cause you to decide against operating on [Claimant]?

A. As I said, I think she has a significant problem that is disabling her, which is consistent with her clinical exam and her MRI findings. I still think she needs an operation. Now, you know, right now she is in misery and has been this way for a long time, so further nonsurgical therapy is not likely to be of any benefit to her.

Q. Have you had experiences where you see people with their neck exhibiting pathology on MR scanning that is much more advanced than [Claimant's], and still they are either asymptomatic or less symptomatic than she is?

[by Mr. Gronau]: Objection. Relevance.

[by Mr. McKenney]: Have you seen that in your practice?

A. Yes.

CX14 at 39.

Finally, the following exchange on redirect examination is noteworthy too:

Q. Okay. Now, let's assume for a moment, Doctor, if we may. Just assume that [Claimant] had some type of degenerative disk disease in her cervical region prior to her injury that she sustained last year in Kuwait.

Is it still your opinion that despite the fact that she may have had degenerative disk disease, that she sustained a permanent aggravation of her neck in terms of the injury suffered?

A. Yes. I mean, if the history I have is correct, she had a cervical spine, which was asymptomatic that became significantly symptomatic following the injury, and has stayed that way.

Mr. Gronau: I have nothing further

Mr. McKenney: No further questions.

CX14 at 42-43.

Timothy E. Budorick, M.D.

Dr. Budorick, a board certified orthopedic surgeon, saw Claimant on two occasions, July 28, 2006, and August 15, 2006. EX36 at 33-36. When discussing his treatment with Claimant, Dr. Budorick noted she was not fully compliant with his instructions for the management of her symptoms. In particular, he noted that she had not taken the prednisone he had prescribed, nor had she sought out the physical therapy he had recommended. EX39 at 11. Dr. Budorick had also recommended that Claimant have a magnetic resonance imaging (MRI) performed, which she did have done on August 7, 2006. EX39 at 12.

When describing his reading of the MRI results, Dr. Budorick stated:

In looking over the – she still had the symptoms. In looking over the MRI, there were several things that were apparent including both by my view and looking over the report of the radiologist, and that was that there were several disk

abnormalities with some prominence of a disk noted a little bit more at the level between what is referred to as C5 and 6, and that was somewhat to the left side. Although it was not – the scan did not allow me to demonstrate or identify a clear-cut nerve compression, there was definitely some protrusion at that disk. The other thing that showed up was a syrinx, which is a fluid filled space within the spinal cord that was, at least in my experience, a moderate sized collection of this fluid in the spinal cord. That syrinx was somewhat narrow at the level above the disk of C5/6. Gradually, it seemed to increase, and size seemed to be maximal near the disk of C6/7, which is actually one disk below the 5/6 disk.

EX39 at 12-13.

Dr. Budorick was not able to opine on whether the syrinx was contributing to Claimant's symptoms or not, and stated he would refer to a neurosurgeon to provide further input in that regard. EX39 at 13. When discussing whether or not the syrinx developed post-trauma, the following testimony is noteworthy:

Q. Dr. Partington testified that the syrinx is a posttraumatic entity that, as I understand it, it came about as the result of the C5-6 disk protrusion. In your experience, Doctor, have you seen what you would consider a syrinx that comes about as a result of a compression at a level such as C5-6 due to some sort of trauma like this?

A. The circumstances with which I am more familiar are – syrinx developing within the spinal cord would generally be very high energy injury mechanism, diving into pools, and, you know, breaking one's neck, or severe automobile accidents, things of that nature where the amount of injury to the neurologic tissue is very substantial. And frequently, those patients would have pretty clear neurologic deficit. And at a subsequent point one, might, on occasion, identify in some of these people that they will develop a syrinx. But in this short period of time and the size of that syrinx, and with the neurologic exam she presented with, I would have trouble believing there's a connection there.

I would be the first to point out, I am not a neurosurgeon, and there are certain aspects of that that I would refer to a neurosurgeon's opinion, but it would seem to me that doesn't quite add up very well.

Q. Is that something that you have not seen in your experience even though you're not a neurosurgeon?

A. Right. I have never seen it. And I have taken care of many patients over the years with various cervical spinal problems, including the traumatic injuries I mentioned, as well as lower-type mechanism of injury, such as [Claimant's], or ones that are even less than that.

EX39 at 20-21.

Dr. Budorick opined that it would be difficult to state with a reasonable degree of medical certainty that Claimant's C5-6 disk condition was related to her injury in Kuwait. EX39 at 24, 30-31. He also testified, though acknowledging it was not entirely his field or area of expertise, but, he opined Claimant's syrinx was also unlikely to have arisen from her Kuwait injury. EX39 at 25. Dr. Budorick further opined that it is difficult to distinguish between degenerative and traumatic injuries on an MRI. EX39 at 23-24. Furthermore, when discussing Claimant's December 2005 automobile accident and subsequent treatment at the emergency room and the chiropractic care she obtained, he opined that the symptoms she has alleged after the Kuwait injury would be consistent with the type of symptoms expected to arise with the injuries she incurred in the automobile accident. EX39 at 25-30.

When asked if he concurred with the type of surgical intervention Dr. Partington was recommending for Claimant, Dr. Budorick replied that he had a "strong lack of confidence that she would benefit at all from the surgery...." EX39 at 32-33. When asked what was the reason for that opinion he stated, "I don't feel like the correlation or collection of pieces of information with regard to her history, her examination, her MRI study would make me feel convinced I have much to offer her from a surgical standpoint with that particular procedure." EX39 at 33. Dr. Budorick testified that his viewing of the short segment of the surveillance video did not alter his opinions and recommendations for Claimant. EX39 at 37-38.

In his office notes Dr. Budorick wrote that Claimant complains of pain in her neck and left arm, and states that her left arm feels dead. EX36 at 35. Of note, Claimant denied any history of this type of pain in the past. *Id.* Dr. Budorick also noted that at the Claimant's August 15, 2006 appointment that she attempted to get him to issue her a handicapped parking pass and he felt uncomfortable with that request. He stated, "I personally like to reserve that for people who have more difficulty with their ability to ambulate and walk." EX36 at 33.

Mark A. Scott, D.C.

Dr. Scott is a chiropractor who treated Claimant following her December 17, 2005, motor vehicle accident. Claimant informed Dr. Scott that she had been transported to the hospital via ambulance after the MVA. EX42 at 11. The chief complaints Claimant had were head pain, neck pain, lower back pain, pain in left arm and vertigo. EX42 at 7. On December 28, 2005, Dr. Scott wrote that when Claimant was describing her neck pain she explained that **the pain radiated from her neck down to her left posterior wrist.** EX42 at 11 (emphasis added). Dr. Scott diagnosed cervical sprain/strain, acute moderate; lumbar sprain/strain, acute moderate with associated nerve root and plexus disorders; cephalalgia; and vertigo. *Id.* On December 28, 2005, Dr. Scott recommended a neurological consult for Claimant's dizziness and vertigo. EX42 at 10.

After Claimant's December 30, 2005 treatment, Dr. Scott noted that Claimant states her symptoms have remained unchanged and that his objective testing findings have also remained unchanged. *Id.* On January 4, 2006, Dr. Scott continued to note that Claimant's symptoms have remained unchanged. EX42 at 12. On January 16, 2006, the chief complaints remained lower back pain, neck pain, headaches, vertigo and numbness in left arm. *Id.* Under the subjective heading, Dr. Scott wrote that "patient states she is fine." *Id.* Under the objective heading he

noted that Claimant's flexion was still moderately restrictive and that on digital palpitation mild to moderate spasm and tenderness was noted. *Id.* Dr. Scott's assessment was "still restriction and tenderness with objectives patient wants to be released from care." *Id.*

Video Surveillance

The video surveillance occurred in two segments, each divided over two days. EX 40 at 41. The Claimant authenticated different segments of the video surveillance in her testimony. TR at 117-120. In the entire video Claimant is seen walking with a normal gait and never appears to be in any pain or have any difficulties with her range of motion or be favoring her left upper extremities. *Id.* The noteworthy segments are described as follows:

March 27, 2007

8:08 a.m.: Claimant is observed leaving her car carrying two to three large bags in her left hand, her right hand is empty.

8:40 a.m.: Claimant is observed carrying her purse and water bottle in her left hand, her right hand is empty.

8:49 – 9:15 a.m.: Claimant is observed running some errands at a strip mall and then waiting in her car for approximately a half-hour waiting for a salon-spa to open.

11:00 a.m.: Claimant is observed carrying a large shopping bag in her left hand.

March 28, 2007

9:25 - 9:33 a.m.: Claimant is observed leaning into the front passenger seat of her car while parked at a convenience store. She is seen picking up trash to throw out and arranging laundry that was scattered in her front seat and removing it to the rear of her station wagon. Of particular note is the amount of time she spends bent over and leaning one way or the other, almost as if she is attempting to fix the headliner from the rear seat of her car. There is a lot of flexing of her neck and spine both to the left and the right in what appear awkward contortions; all this is accomplished over the course of several minutes without any outward appearance of trouble. At two different points Claimant is observed emptying out drinking containers with her left hand, the one time she is seen shaking out a water bottle with her left hand before throwing it away.

9:54 a.m.: Claimant is observed carrying a large purse and a shopping bag with her left hand while carrying a drink cup with her right hand.

10:06 a.m. Claimant is observed opening the rear hatch of her station wagon with her left hand, there was nothing in her right hand to have prevented her from using that arm. This required reaching well above her head with her left arm

10:10 a.m. Claimant is observed closing the rear hatch of her station wagon with her left hand, there was nothing in her right hand to have prevented her from using that arm. This required reaching well above her head with her left arm.

10:11 a.m. Claimant is observed walking into her home with a large purse in her left arm and her drink cup in her right hand.

April 2, 2007

10:00 a.m.: Claimant is observed leaving a Food Lion with grocery bags in her right hand and a drink cup in her left.

10:31 a.m.: Claimant is observed walking with her keys in her right hand and her drink cup in her left hand.

11:06 a.m.: Claimant is observed walking with her purse and water bottle in her left hand, her right hand appears empty.

April 4, 2007

1:57 p.m. Claimant is observed exiting the passenger seat of her car, after being driven by another woman, and carrying a large stack of papers and several packages with her left hand. She shifts around while walking and then is carrying the packages with her right hand, and what appears to be a large stack of papers in her left hand.

Sentara Bayside Hospital

There are seventy-two pages of records from Claimant visiting Sentara hospital from October 5, 2005, through January 27, 2006. The following are noteworthy for their demonstration of prior neck and back problems:

- Claimant visited the emergency room on October 5, 2005 for a pulled muscle in her lower back that was handled under workers compensation. EX37 at 5.
- Claimant visited the emergency room for pelvic and back pain, vicodin was prescribed. EX37 at 14, 22.
- Claimant was transported by ambulance to the emergency room after her motor vehicle collision on December 17, 2005; she was treated for head and neck pain. EX37 at 30.
- Claimant came back to the emergency room on December 28, 2005, still complaining of dizziness and neck pain. EX37 at 41.
- At the December 28, 2005 emergency room visit Claimant complained of: occasional blurry vision; occasional memory loss and headache; nausea; and confusion.

- At the same December 28, 2005 visit Claimant was diagnosed with frontal tenderness in her scalp; tenderness, stiffness and painful range of motion in her neck; and tenderness in her lumbar spine. EX37 at 44. Claimant complained of headaches, memory problems, malaise, occasional nausea, and occasional blurry vision. She was diagnosed with probable post-concussion syndrome and referred for a neurological consultation. EX37 at 45-46.

DISCUSSION

Claimant seeks a TTD compensation award for the injury she suffered in Kuwait, the broken nasal cavity and the sequelae of that injury which she maintains is the neck, left arm and spinal problems she alleges, in addition to the psychological impairment her injury has caused. Claimant also argues she deserves full medical coverage for her injury and its sequelae, reimbursement for what she has paid to date out of pocket and coverage for the future operation Dr. Partington is recommending. Additionally, Claimant argues the TTD compensation she has been receiving is lower than it should be because the Employer has improperly calculated her AWW.

Employer argues that Claimant's broken nasal cavity is the only compensable injury that arose from the accident in Kuwait. They further maintain that the AWW they have been paying Claimant has been calculated properly. Finally, they argue that while they disagree with the causation of Claimant's neck, left arm and back complaints, and the psychological problems she alleges, they would abide by and provide the conservative medical care Dr. Budorick has recommended; which includes epidural steroid injections, functional capacity evaluation, and physical therapy, followed by a new MRI if so indicated. EX39 at 34-35.

Section 20(a) Presumption

According to Section 20(a) of the LHWCA, "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). "Section 20(a) . . . provides claimant with a presumption that her injury is causally related to her employment if claimant establishes a harm and that working conditions existed or an accident occurred which could have caused, aggravated or accelerated the harm." *Uglesich v. Steverdoring Servs. of Am.*, 24 B.R.B.S. 180, 182 (1991) (citing *Blake v. Bethlehem Steel Corp.*, 21 B.R.B.S. 49 (1988)).

Once the claimant establishes these elements of a prima facie case, the Section 20(a) presumption applies to link the harm with the claimant's employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985). This statutory presumption applies to the issue of whether an injury arises out of and in the course of employment. *Travelers Ins. Co. v. Donovan*, 221 F.2d 886 (D.C. Cir. 1955) (citing *O. Leary v. Brown-Pacific Maxon, Inc.*, 340 U.S. 504 (1951)). It is grounded in the humanitarian purpose of the LHWCA, favoring awards in arguable cases. *Leyden v. Capitol Reclamation Corp.*, 2 BRBS 24 (1975), *aff'd mem.*, 547 F.2d 706 (D.C. Cir. 1977).

The Section 20(a) presumption does not apply, however, to aid the claimant in establishing her prima facie case. The claimant must establish a prima facie case by proving that she suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), aff'd mem., 600 F.2d 280 (D.C. Cir. 1979), and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). See *U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley)*, 455 U.S. 608, 14 BRBS 631, 633 (1982), rev'g *Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993).

It is the claimant's burden to establish each element of her prima facie case by affirmative proof. See *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Therefore, like any other element of her case to which a presumption does not apply, the claimant has the burden of establishing harm, and the existence of an accident that could have caused her harm, by a preponderance of the evidence. In other words, before availing herself of the Section 20(a) presumption, Claimant must establish that the incidents claimed to be the cause of her injury in fact occurred.

Once the claimant has established a prima facie case, thus invoking the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Peterson v. General Dynamics Corp.*, 25 BRBS 14 (CRT) (2d Cir. 1992), cert. denied, 507 U.S. 909 (1993); *Davidson v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). If the presumption is rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established, with the claimant bearing the burden of persuasion. See, e.g., *Meehan Service Seaway Col. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114 (CRT) (8th Cir. 1997), cert. denied, 523 U.S. 1020 (1998); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

In this case, Claimant has failed to establish a *prima facie* case, and as such is not entitled to invoke the Section 20(a) presumption. As indicated above, the establishment of a *prima facie* case has two prongs, and though Claimant has established the first, she has suffered a harm or pain; she has failed to establish the second. Here, Claimant has shown that she suffered a harm or pain while working for the Employer; she clearly suffered a nasal fracture, which has been well documented and stipulated to at the hearing. Accordingly, I find that Claimant has established that she suffered harm with her nasal fracture and has satisfied the first prong of the Section 20(a) presumption.

Where Claimant has failed with the Section 20(a) presumption is on the second prong. She has not proven by a preponderance of the evidence that her accident in Kuwait could have caused the harm she alleges, except for the nasal fracture, which has been treated appropriately and resolved. TR at 42 (Claimant agrees she received excellent care for her nose in Kuwait).

Where the divergence occurs is when Claimant argues that her accident in Kuwait led to her neck, back and left arm/hand problems and her alleged psychological impairment.³

Claimant's testimony taken alone, without corroboration of medical evidence, is insufficient to demonstrate "a harm" which is necessary to establish a *prima facie* case. See *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988) (the ALJ can properly discredit the credibility of a claimant's testimony and conclude that the evidence fails to establish the occurrence of an injury). As will be discussed more below, Claimant's credibility does come into question, and as such I assign less weight to her testimony.

In this case, Claimant relies on Dr. Partington's opinion that her neck complaints are consistent with her injury in Kuwait. CX14 at 21. The problem arises when Dr. Partington states that Claimant never disclosed any prior neck or left arm problems. CX14 at 27. He further states that if there had been a prior injury he would have trouble relating her Kuwait accident to her present complaints. CX14 at 27-28. Less than five months before Claimant's Kuwait accident she was twice treated in the emergency room and multiple times by a Chiropractor for very similar symptoms that arose from her December 17, 2005, motor vehicle accident. See EX37; EX42. Additionally, Dr. Budorick is on the record stating he does not relate Claimant's MRI findings to her accident in Kuwait. EX39 at 20-31.

Furthermore, as noted above, Dr. Partington testified there was no accurate way to date when Claimant's disc herniation occurred or when the origination of her syrinx would have formed. Also, as noted above, when Dr. Partington was questioned about whether Claimant's back symptoms could have been caused by some degree of degeneration given her age and smoking history, he answered, it was possible, but that if the history she provided was correct she had been asymptomatic prior to her Kuwait accident. As the record shows, Claimant was not asymptomatic prior to the Kuwait accident.

In *U.S. Industries*, the United States Supreme Court declined to address the scope of the Section 20(a) presumption, but noted that a *prima facie* claim must at least allege an injury that arises out of and in the course of employment and that the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. Thus, *U.S. Industries* is consistent with the Board's holding that a claimant must establish a *prima facie* case before the Section 20(a) presumption is invoked. See *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280 (1990); *Cairns v. Matson Terminals*, 21 BRBS 252 (1988). With this well settled case law in mind, I find that Claimant has failed to prove by a preponderance of the evidence that her neck, back and left arm problems, as well as her alleged psychological impairment could have been caused by her accident in Kuwait. And as such, Claimant will not benefit from the Section 20(a) presumption.

³ It would be difficult for Claimant to make a credible argument for aggravation of a pre-existing condition given that nowhere in the record, until her post-hearing brief, did she even mention the "Aggravation Rule," and even that was just a passing reference, not an argument in support of that position. Claimant's post-hearing brief at 14. The evidence in the record is quite to the contrary. When asked the state of her health before the accident in Kuwait, Claimant stated, "I was very athletic, no problems." When further asked if she had any problems before Kuwait, medical, orthopedic or otherwise, she answered, "No." EX38 at 63. Furthermore, with both Drs. Partington and Budorick, Claimant stated no prior history of neck, back, or left arm problems. CX14 at 27; EX36 at 20.

In this court's opinion, Claimant did nothing to help her case by neglecting to inform her treating physicians of her prior neck, back and left arm problems. As Dr. Partington clearly pointed out, it is difficult for a physician to accurately treat a patient if they do not have an accurate history to rely on. It appears from the record that Claimant only even admitted the existence of her motor vehicle accident and subsequent treatment after Employer's counsel discovered same through his investigations. *See* TR at 112 (Claimant's counsel complaining of "trial by ambush," in regards to Claimant being questioned about her post motor vehicle accident treatment by Dr. Scott).

Furthermore, I found the surveillance video to be incongruent with Claimant's stated symptoms, those stated to this court and those made to her physicians. Claimant's left arm does not appear "dead" when she uses it to open or close the rear hatch of her vehicle. EX41 at 10:06 a.m., 10:10 a.m. Throughout both videos there was no evidence of Claimant favoring her left arm over her right. *See* EX41; EX42. In fact, there were multiple occasions when Claimant had large packages in her left hand, when her right hand was empty. *Id.* There was also no evidence that Claimant's left elbow was in "excruciating" pain; or that because of the numbness in her left hand that she was "continuously" dropping things; or, for that matter, was there any evidence, beyond Claimant's testimony, that she was having such trouble walking that her left hand was scarred from the times she fell into walls and used her left hand to keep herself from falling to the ground. TR at 91-93.

The video surveillance showed what appeared to be a well-functioning young woman performing the chores of regular daily activities without any disability or impairment. Of particular note was the approximately ten minute segment in front of the convenience store where Claimant is bending at the waist and leaning into her vehicle almost the entire time. She is clearly viewed crawling around the car with no apparent discomfort, leaning into the back seat and turning her upper torso and head both to the left and right as she appears to be working on the roof area of her car, with her hands extended above her head while her body is at an awkward angle; the exact type of range of motion that Dr. Partington said would be particularly difficult for her to perform. EX40 at 9:25 a.m.

In arguendo, even if one allows that Claimant could establish a *prima facie* case that she suffered a harm that could have arisen from her Kuwait work injury, beyond her treated nasal fracture, it is clear from the aforementioned evidence that the Employer has successfully rebutted the presumption with substantial countervailing evidence. Hence, the presumption falls out and the evidence must be weighed in its entirety. As already shown, the Claimant has not proven by a preponderance of the evidence that her present medical problems arose from her May 5, 2005 work injury suffered in Kuwait. Therefore, even if Claimant could establish a *prima facie* case I would find, based on the evidence in the record, that causation is lacking and Claimant is not entitled to any further recompense under the Act.⁴

⁴ It is noteworthy that Employer has offered to provide the conservative treatment that Dr. Budorick recommended, which includes epidural steroid injections, physical therapy and a future MRI and/or a CAT scan myelogram. EX39 at 34-35. This Decision and Order is not going to require that remedy, though the Employer is commended for making the offer.

CONCLUSION

I have determined the following based on a complete review of the record in light of the argument of the parties, testimony of the witnesses, applicable statutory provisions, regulations, and pertinent precedent. Claimant has failed to meet her burden, by proving by a preponderance of the evidence that her neck, back and left arm problems, and her alleged psychological impairment was caused by her May 5, 2006, work injury. Furthermore, because Claimant is not entitled to any future compensation under the Act, the issue of her average weekly wage is moot.

ORDER

It is hereby **ordered** that the claim of P.S. for any disability compensation and medical benefits under the Act is **denied**.

A

Kenneth A. Krantz
Administrative Law Judge

Newport News, Virginia
KAK/tls